

KEVIN KINSEY & KAREN	:	BEFORE THE
KEEGAN AND EARL & LISA HICKS	:	
Appellants	:	HOWARD COUNTY
vs.	:	BOARD OF APPEALS
DEPARTMENT OF PLANNING	:	HEARING EXAMINER
AND ZONING	:	
HOWARD COUNTY, MARYLAND	:	BA Case No. 613-D
Appellee	:	
vs.	:	
BRUNO REICH	:	
Appellee	:	

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DECISION AND ORDER

On October 29, 2007, the undersigned, serving as the Howard County Board of Appeals Hearing Examiner, and in accordance with the Hearing Examiner Rules of Procedure, conducted a hearing on the departmental appeal of Kevin Kinsey & Karen Keegan and Earl & Lisa Hicks (the "Appellants"). The Appellants are appealing a July 20, 2007 letter from the Department of Planning and Zoning ("DPZ") to Bruno Reich granting approval of a three-lot Final Subdivision Plan for Glenair Overlook on Sharp Road in an RR-DEO (Rural Residential: Density Exchange Option) zoning district. Appellants Kinsey and Keegan reside at 3711 Sharp Road (Lot 2 of the Reich Subdivision). Appellants Earl and Lisa Hicks reside at 3705 Sharp Road (Lot 3 of the Reich Subdivision). The 8.386± acre subject property is known as 3649 Sharp Road.

The Appellants certified that notice of the hearing was advertised and that adjoining property owners were notified as required by the Howard County Code. I viewed the subject property as required by the Hearing Examiner Rules of Procedure.

Kevin Kinsey & Karen Keegan and Earl & Lisa Hicks

Richard L. Miller, Esquire, represented the Appellants. Allan Fishbein, Esquire, represented Bruno Reich. Paul Johnson, Deputy County Solicitor, represented DPZ. Kevin Kinsey, Earl Hicks, and Joe Snider testified on behalf of the Appellants. Cynthia Hamilton testified on behalf of DPZ.

Background

Howard County approved an 8-lot development apparently known as the Glenair Subdivision in the early 1970s. The subdivision comprised eight contiguous lots running east-west to Sharp Road, with access provided via a private driveway easement along the lots' northern property lines. In 1979, the Howard County Board of Appeals granted these property owners' request for a private use/private ownership aircraft land and storage area special exception use known as Glenair Airport. In 1989, the Board granted the owners' request to continue the use. As approved, the aircraft landing and storage area is a 150-foot wide airstrip easement (the "airstrip easement") running about 3,200 feet along the southerly property lines of what was originally the 8-lot Glenair Subdivision.¹

Prior to the Board's initial grant of the special exception use, Bruno Reich sought to subdivide what was apparently Lot 1 of the Glenair Subdivision to create 4 new lots. DPZ approved the 4-lot subdivision, F 78-52, and the final subdivision plat (the "Reich Subdivision") was recorded in the Howard County Land Records in October 1977. The Reich Subdivision recorded plat contains an asterisked note (the "plat restriction note") signed by Bruno Reich and states:

Building development on Lots 1 and 4 of this subdivision shall not commence until the easement on said lots for airstrip is removed.

By letter dated July 20, 2007, DPZ approved Glenair Overlook, Bruno Reich's 3-lot

¹ Glenair Airport/Airfield has a lengthy and complex history dating back to the early 1970s and includes several lawsuits. See Board of Appeals Case No. 87-42E, as clarified on July 30, 2007, and Board of Appeals Case No. 578-D, which denied the Appellant's administrative appeal concerning enforcement of certain conditions of approval in BOA Case No. 87-42E.

resubdivision plan for Lots 1, 2, and 3 on Sharp Road in the Fourth Election District (Glenwood).

The Glenair Overlook Plan is a resubdivision of Lots 1 and 4 of the 1977 Reich Subdivision.

The Appellants filed an administrative appeal to DPZ's July 20, 2007 action on August 16, 2007. Their supplemental petition statement charges as follows.

1. DPZ wrongly relied on Mr. Reich's factual representations concerning Judge Sweeney's decision in prior litigation (Circuit Court Case No. 13-C-04-57670 DJ), committing error of fact or law.
2. DPZ arbitrarily and capaciously ignored or failed to give proper legal effect to its prior plan comments of December 5, 2006 (which are attached to the petition). The Appellants specifically note DPZ's comment #2, which refers to the plat restriction note and requires the applicant (Mr. Reich) to "demonstrate that the 150-foot wide [airstrip] easement along Reich Lots 1 & 4 (now included in F-07-53 Glenair Overlook as Lots 2 & 3) has been abandoned." They also note comment #3, which states: "Alternatively, explain why the note has been omitted from the current plan. While this office cannot enforce private covenants, the prohibition recorded on the plat #3858 is enforceable by Howard County."
3. DPZ arbitrarily or capriciously ignored or failed to give legal effect to its determination letter of May 17, 2007 to Bruno Reich (which is attached to the petition). Therein, DPZ stated as follows.

Development of Lots 1 and 4 of the Reich Subdivision as recorded on Plat 3858 (currently parts of Glenair Overlook Lots 1 and 3) may occur if the portion of the lots upon which the residential development will occur is unencumbered by the airstrip easement and the proposed development complies with applicable regulations, unless waivers have been obtained.

4. By letter of November 3, 2006 from Appellants' counsel to Cindy Hamilton, the Chief of DPZ's Division of Land Development ("DLD"), the Appellants further argue the proposed subdivision's ingress/egress driveway over an existing 50-foot airplane ingress/egress easement granted to Mr. Kinsey by Mr. Reich would compromise the former's ability to use and access the airstrip. The letter also claims the driveway would exacerbate the flooding problem at the Hicks residence (Lot 3 of the Reich Subdivision), and violates the plat restriction note.

Testimony and Evidence of Record

1. At the October 29 hearing, the Appellants introduced into evidence 14 exhibits, including the following.

- Appellants' Exhibit 2. A copy of F-78-54, the Reich Subdivision Plat, which shows the plat restriction note.
- Appellants' Exhibit 3. A copy of an easement agreement (apparently recorded in the Howard County Land Record in February 1996) between Appellants Kinsey and Keegan and Bruno Reich. The agreement establishes a 50-foot right-of-way easement across Reich Subdivision Lot 1 for the sole purpose of ingress and egress by a plane from the Kinsey/Keegan property to the existing airstrip on Lots 1 and 4, Reich Subdivision, and Lots 2 and 8, Glenair Subdivision. The right-of-way runs with the land and is binding on the heirs, executors, and assigns of the parties.
- Appellants' Exhibits 4-5. Aerial photographs of the Glenair Overlook Subdivision taken by Mr. Kinsey and showing Appellants Kinsey and Keegan's residence (the driveway of which is accessed from Sharp Road, not the private road to the north), Appellants Hicks' residence (the rear property is fenced in), and a house under construction on Glenair Overlook Subdivision Lot 2 (the Reich residence).

Kevin Kinsey & Karen Keegan and Earl & Lisa Hicks

- Appellants' Exhibit 7. A copy of the Glenair Overlook Subdivision Plan, dated June 4, 2007.

The plan shows a private egress/ingress driveway for the use and benefit of Lots 1 and 3 coming off Sharp Road just to the south of the Kinsey/Keegan property, following the Appellants' rear property lines and stopping behind Lot 1. The plan also notes a 50-foot right-of-way from Reich Subdivision Lot 2 for access to the airstrip on Reich Subdivision Lots 1 and 4, and 2 through 8. The proposed driveway crosses this right-of-way.

- Appellants' Exhibit 8. A copy of the Glenair Overlook Supplemental Plan, dated October 6, 2006, showing proposed landscaping, soils, and forest conservation. The Supplemental Plan shows perimeter landscaping along the private driveway where it adjoins the Appellants' properties. Note 25 states Lot 2 is exempt from the Landscape Manual's perimeter landscaping requirements because it contains an existing dwelling.

2. Appellants Kinsey and Hicks testified that before purchasing their lots, Mr. Reich showed them the Reich Subdivision Plat and expressly represented to them that no development would occur on Lots 1 and 4 until the airstrip easement was removed.

3. Kevin Kinsey testified to purchasing 3711 Sharp Road ten years ago from Bruno Reich, who showed him a copy of the Reich Subdivision Plat (Appellants' Exhibit 2). He stated Mr. Reich explained the asterisked plat restriction note meant that Lots 1 and 4 would not be developed until the airstrip was abandoned. One condition of purchase was the provision of a 50-foot access easement, which was later memorialized in writing and recorded in the Howard County Land Records (Appellants' Exhibit 3). The easement permits him to traverse Lot 1 of the Reich Subdivision to access the airstrip on Lot 1. Mr. Kinsey explained he was a pilot who kept a plane on his property and flew 2-3 times a week.

4. Referring to photographic Exhibits 4 and 5, Mr. Kinsey stated they show the original Reich Subdivision area, the construction of a house on Glenair Overlook Subdivision Lot 1, the Hicks property and his property. He pointed out a mowed grass area as the general area of the 50-foot access easement, which runs up a steep slope. It was his opinion that the driveway² shown on the Glenair Overlook Subdivision plan (Appellants' Exhibit 7) and the Supplemental Plan (Appellants' Exhibit 8) and crossing the 50-foot easement area would make it more difficult for him to taxi to the airstrip. He had specific safety concerns about traversing the potentially paved or crushed gravel 12-foot wide driveway³ with a blind intersection and the required perimeter landscaping. In his opinion, the road grade would have to change to make it safe and to reduce runoff. He also stated there were no changes to the plat restriction note and no plans to discontinue the airstrip.

5. On cross-examination, Mr. Kinsey testified that his driveway is paved, generally runs parallel to the proposed driveway, and that motorists on the proposed driveway might not hear his plane. Referring to recent photographs of his property (Appellants' Exhibit 9A-D), Earl Hicks (Reich Subdivision Lot 2) testified they showed a large bare area in the rear of his property. In his opinion, the bare area was caused by winter runoff from quarrying related to the construction of the house on Glenair Overlook Lot 2. It was also his testimony that the absence of any recent runoff problems was the result of the spring and summer drought. He objected to the Glenair Overlook Subdivision based on the plat restriction note, potential runoff, road noise, quality of life, and the effect of the development on property values.

² The Appellants and their witnesses generally referred to the driveway as a road.

³ Note 12 on the Supplemental Plan states the driveway must be 12 feet wide if it serves one residence and 14 if it serves two.

6. Joe Snider, a professional surveyor, testified to preparing a topographic worksheet dated October 2007 (Appellants' Exhibit 10) based on the Supplemental Plan. He explained the red arrows on the worksheet shows how water drains. He also noted the 50-foot easement for the Kinsey's use has a 10% slope. Discussing the proposed grading in the 50-foot easement area, he stated the proposed driveway grade would pitch toward the Kinsey and Hicks properties. The driveway would also create a "terrace" causing some problems for Mr. Kinsey in the 50-foot easement area. On cross-examination, Mr. Snider stated he did not know the Howard County Subdivision and Land Development Regulations (the "Subdivision Regulations").

7. Cindy Hamilton, Chief of DPZ's Division of Land Development Division ("DLD") testified DPZ approved the Glenair Overlook Subdivision Plan (F-07-053) because the Planning Director (Marsha McLaughlin) determined the plat restriction note on the Reich Subdivision plat was not within the department's authority to enforce. Nor was she aware of any past or present Subdivision Regulations that would permit DPZ to enforce the restriction. She testified to seeing in the F-07-053 file a Declaration of Covenants dated September 21, 1973 (DPZ Exhibit 1) and apparently referring to an 8-lot subdivision with a common driveway and common airstrip to be constructed and shared by the lot owners (apparently the original Glenair Subdivision). It was her impression the covenants were most likely submitted by an applicant or consultant when a resubdivision was first proposed as early as 2001.

8. In reference to matters of flooding and stormwater management, she stated DPZ's Division of Engineering Development handles these issues and nothing in their comments suggested any outstanding issues that might cause DPZ to hold the plan for revisions. She testified the proposed landscaping is intended to screen adjoining neighbors, and that the screening could be lightened if there were a safety issue.

9. On cross-examination, Ms. Hamilton stated in reference to Appellants' Exhibit 11, the August 3, 2007 approval letter, that the Glenair Overlook Plan was technically acceptable except for the availability of APFO housing unit allocations. As to DPZ's letter of July 20, 2007 to Bruno Reich (Appellants' Exhibit 12), she stated the maintenance agreement for the proposed use-in-common driveway had not yet been prepared, but must be recorded in conjunction with the final plat.

10. Referring to Appellants' Exhibit 13 (a March 26, 2007 handwritten note by Ms. Hamilton stating the Office of Law would enforce the plat restriction note), and Appellants' Exhibit 14 (a April 2, 2007 DPZ letter to Bruno Reich stating DPZ must enforce the plat restriction note), Ms. Hamilton stated DPZ's change in position on the plat restriction's enforceability was based on continued correspondence with the Office of Law, the ambiguity of the plat restriction note, and ultimately, its lack of basis in any law that DPZ can enforce.

11. On redirect, it was Ms. Hamilton opinion that DPZ could not recommend approving a building permit based on the Reich Subdivision plat restriction note (the only recorded plat), which is only enforceable at the building permit stage.

CONCLUSIONS OF LAW

I. Standard of Review

Section 16.105(a) of the Howard County Code authorizes appeals of DPZ decisions, including the approval of a subdivision or resubdivision plan.

A person aggrieved by an order of the Department of Planning and Zoning may, within 30 days of the issuance of the order, appeal the decision to the Board of Appeals.

Because the Appellants are adjoining property owners with protectable interests, they are aggrieved persons who timely filed this appeal.

Rule 10.2(c) of the Hearing Examiner Rules of Procedure sets out the burden and standard of proof in such appeals.

In any other appeal of an administrative agency decision, the petitioner must show by substantial evidence that the action taken by the administrative agency was clearly erroneous, arbitrary and capricious, or contrary to law.

II. The Reich Subdivision Plat Restriction Note

A. DPZ's Decision to Approve the Resubdivision of Reich Subdivision Lots 1 and 4 as Glenair Overlook Lots 1, 2, and 3

The primary issue in this case is whether the Reich Subdivision plat restriction note binds DPZ to the extent that the department cannot act to approve a resubdivision plan for Reich Subdivision Lots 1 and 4 until the airstrip easement on the two lots is removed. The Appellants' argument that DPZ is so bound rests in main part on this: the department started to process the proposed Glenair Overlook resubdivision plan under the premise that they were required to enforce the plat restriction note. In support of this claim, the Appellants introduced Appellants' Exhibits 12, 13, and 14 to show Cindy Hamilton, the DLD chief, stated in writing that DPZ would enforce the restriction based on consultation with the Office of Law. That DPZ allegedly chose to abandon the position adopted in these writings and approve the resubdivision of Reich Subdivision Lots 1 and 4 as Glenair Overlook Lots 1, 2, and 3 is substantial evidence, in the Appellants' view, of DPZ acting in an arbitrary and capricious manner.

DPZ argues it has no authority under the Subdivision Regulations or any other county law to enforce the plat restriction.

In my view, the Appellants' testimony and evidence on this claim is indicative only of the County's substantial efforts to assess their legal responsibilities with respect to the plat restriction

note, an assessment that, in Ms. Hamilton's own words, changed course over time as DPZ wrestled with what the department viewed as an ambiguous and unusual plan note. Absent substantial evidence of any statute, ordinance or regulatory authority to compel DPZ to act otherwise, the Appellants' argument here fails.

B. The Appellants' Reliance on the Plat Restriction Note

Appellants Kinsey and Hicks also ask us to consider their reliance on the plat restriction note and Bruno Reich's verbal representations about the restriction when they purchased their lots. As Hearing Examiner, I am authorized to hear only those matters that are otherwise within the jurisdiction of the Howard County Board of Appeals. Section 16.302(a) of the Howard County Code. The Board is authorized to hear only such matters as are set forth in Article 25A, Section 5(U) of the Annotated Code of Maryland and as are further set out in implementing legislation enacted by the County Council. Section 501(b) & (f) of the Howard County Charter.

Neither Article 25A nor the County Code contains any provision authorizing the Board of Appeals or the Hearing Examiner to enforce or interpret what is apparently some type of private agreement.⁴ Consequently, neither the Board nor I have authority to enforce the plat restriction note.

III. Safety, Runoff, and Property Value Concerns

Mr. Kinsey argued the proposed road would create certain safety issues (a blind intersection, landscaping, road composition, and slope) where it crosses his 50-foot airstrip easement. While DPZ is cognizant of the easement and the easement is noted on the Glenair Subdivision and Supplemental

⁴ I use the term private agreement here simply to mean that the plat restriction note is not a public agreement, not as an interpretation of that note, or to suggest the agreement relied upon was originally effective or remains effective at the time of this appeal.

plans, neither the department nor I have authority to enforce a private agreement such as an easement, as discussed above.

Appellants Kinsey and Hicks further argue the proposed driveway is generally unsafe, owing to its design, will not offer safe access to emergency vehicles, and will cause flooding/runoff onto their properties. Referring to Appellants' Exhibit 10, Mr. Snider explained why the road at its particular location would cause impermissible runoff. He admitted to having no familiarity with the Subdivision Regulations. Here I observe Note 12 on the Glenair Subdivision Plan, which requires the proposed driveway/s to provide safe access for emergency and imposes minimum design requirements consistent with the County's Design Manual road construction standards.

Absent substantial evidence that a driveway constructed to these standards would create the alleged problems, I conclude the Appellants' evidence does not substantiate agency error or arbitrary and capricious action. Finally, while I am sympathetic to Mr. Hicks' runoff problem, his testimony about the condition of his back yard suggests it is related to the construction on a neighboring property and not to the matter on appeal, DPZ's approval of the Glenair Overlook Subdivision.

IV. Judge Sweeney's Decision in Circuit Court Case No. 13-C-04-57670 DJ

Although the supplement to Appellants' petition avers DPZ wrongly relied on Mr. Reich's factual representations concerning Judge Sweeney's decision in prior litigation, committing error of fact or law, they offered no testimony or evidence on the matter. This claim is therefore dismissed.

Conclusion

Based on the petition of appeal and after oral argument, and considering the evidence and testimony of record, I conclude the Appellants have failed their burden of showing by substantial evidence that DPZ's action in approving the Glenair Subdivision Plan is clearly erroneous, arbitrary and capricious, or contrary to law.

ORDER

Based upon the foregoing, it is this 28th day of November 2007, by the Howard County Board of Appeals Hearing Examiner, **ORDERED:**

That the Petition of Appeal of Kevin Kinsey & Karen Keegan and Earl & Lisa Hicks in BOA Case NO. 613-D is hereby **DENIED**.

**HOWARD COUNTY BOARD OF APPEALS
HEARING EXAMINER**

MICHELE L. LEFAIVRE

Michele L. LeFaivre

Date Mailed: 11/30/07

Notice: A person aggrieved by this decision may appeal it to the Howard County Board of Appeals within 30 days of the issuance of the decision. An appeal must be submitted to the Department of Planning and Zoning on a form provided by the Department. At the time the appeal petition is filed, the person filing the appeal must pay the appeal fees in accordance with the current schedule of fees. The appeal will be heard *de novo* by the Board. The person filing the appeal will bear the expense of providing notice and advertising the hearing.